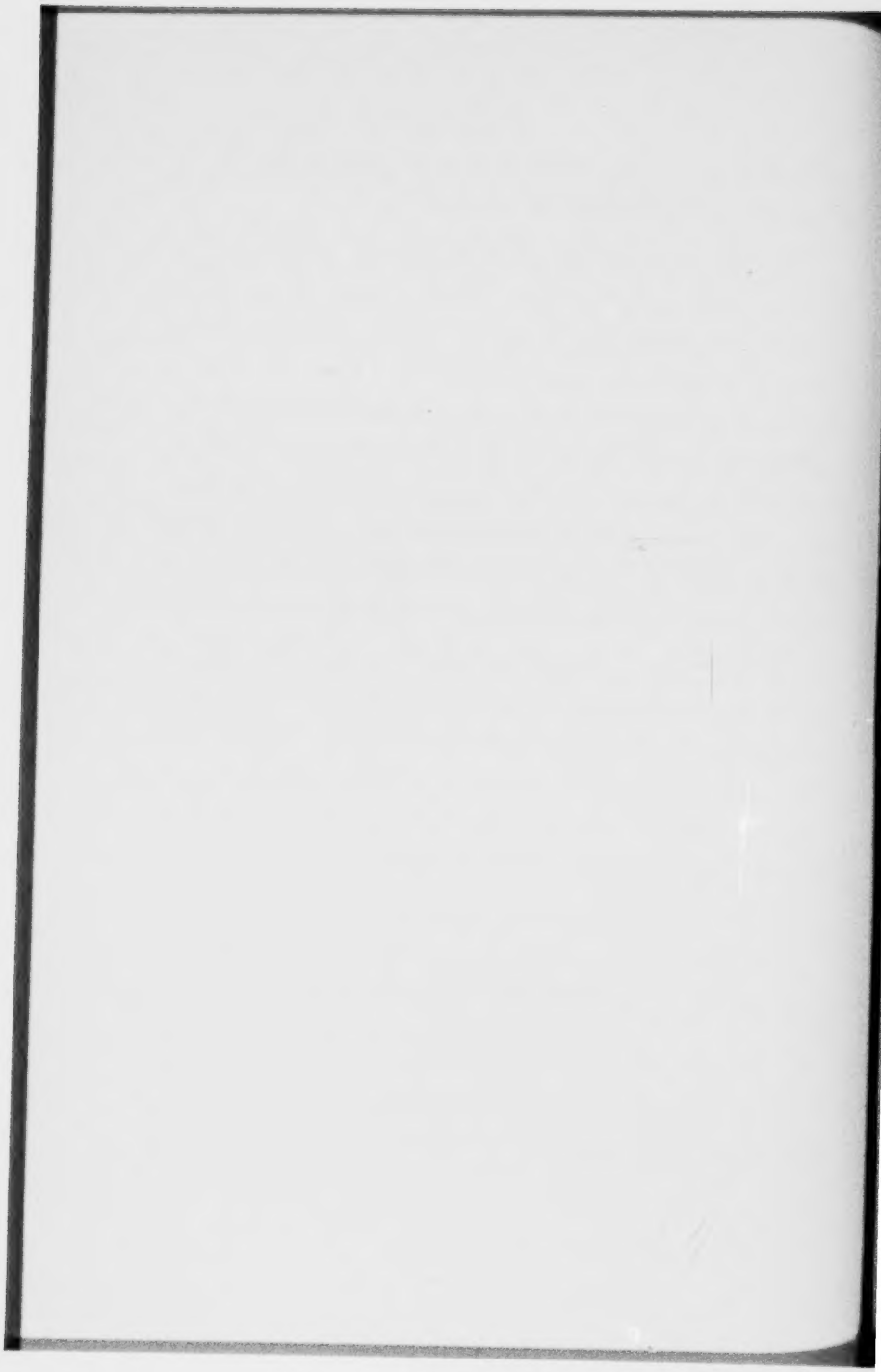

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

NO. 901

GEORGE PITTS, *Petitioner,*

v.

FRED G. DRUMMOND, *Respondent.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

On Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma.

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SUPREME COURT OF THE UNITED STATES

NO. 901

GEORGE PITTS, *Petitioner,*

v.

FRED G. DRUMMOND, *Respondent.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.

Rule of Court.

Section 5 of Rule 38 of the Rules adopted February 13, 1939.

"A review on a writ of certiorari is not a matter of right, but of sound judicial discretion, *and will be granted only where there are special and important reasons therefor*".

There is no special or important reason therefor in this case.

II.

Question.

The only question raised is as to whether or not George Pitts, the petitioner, could alienate inherited land by the giving of a mortgage thereon.

III.

Summary.

The application for writ of certiorari should be denied for these reasons:

1. The legality or justness of the indebtedness owing from George Pitts to the respondent is not now and has never been questioned during the progress of this litigation.

2. Congress has directed payment of that indebtedness.

3. The amount involved is small.

4. The question involved is not of public interest.

5. The Decision of the State Supreme Court is not contrary to or in conflict with any federal statute or holding of any court.

IV.

Dates.

George Pitts was granted a certificate of competency July 11, 1910.

His wife, Mamie Pitts, a full-blood Osage Indian, who was never granted a certificate of competency, died May 24, 1937.

George Pitts gave a mortgage on the lands inherited by him from her on July 12, 1937. The certificate of competency held by George Pitts was revoked by the Secretary of the Interior on June 24, 1938, almost a year after the mortgage had been given.

V.

Legality and Justness of Debt Admitted

The legality or justness of the indebtedness owing from George Pitts to the respondent is not now and has never been questioned during the progress of this litigation.

VI.

Congress has directed payment of that indebtedness.

Section 4 of the Osage Act of February 27, 1925 (25 U. S. C. A. sec. 331, note) provides:

> "Sec. 4. Whenever the Secretary of the Interior shall find that any member of the Osage Tribe of more than one-half Indian blood, to whom has been granted a certificate of competency, is squandering or misusing his or her funds, he may revoke such certificate of competency after notice and hearing in accordance with such rules and regulations as he may prescribe and thereafter the income of such member shall be subject to supervision and investment as herein provided for members not having certificates of competency to the same extent as if a certificate of competency had never been granted; Provided, *That all just indebtedness of such member existing at the time his certificate of competency is revoked shall be paid by the Secretary of the Interior,* or his authorized representative, out of the income of such member, in addition to the quarterly income hereinbefore provided for; And provided further, *That such revocation or cancellation of any certificate of competency shall not affect the legality of any transactions theretofore made by reason of any certificate of competency.*"

The meaning of this section is clearly stated by the opinion of the Tenth Circuit Court of Appeals in the case of United States v. Sands, 94 F. (2d) 156, which involved a mortgage on land, but not inherited land:

(From the syllabus)

"8. The revocation of a certificate of competency of an Osage Indian, who was vested with title to land subject to a valid mortgage lien securing notes, did not affect the rights of the owner and holder of the notes and mortgage. Act. Feb. 27, 1925, sec. 4, 25 U. S. C. A. sec. 331 note.

"13. Where an Osage Indian, at the time notes and a mortgage were executed, held a certificate of competency, the owners and holders of the notes and mortgage had a right to rely on the statute requiring the payment by the Secretary of the Interior of all just indebtedness existing at the time of the revocation of such certificates and providing that such revocation or cancellation shall not affect the legality of any transactions theretofore made by reason of the issuance of a certificate of competency. Act. Feb. 27, 1925, sec. 4, 25 U. S. C. A. sec. 331 note.

"15. The United States is not entitled to have a sale of land under a decree foreclosing a mortgage executed by an Osage Indian prior to revocation of his certificate of competency set aside, to have title quieted in his heirs, and to have an injunction against those claiming under the mortgage, until the indebtedness has been paid."

A compliance with this statute and law would have avoided this litigation entirely, and it should be remembered that the validity and justness of the indebtedness is not questioned.

The amount involved is small.

VII.

It is below the amount required to give even a federal trial court jurisdiction in most cases.

VIII.

The question involved is not of public interest.

When the petitioner stated that the "title of thousands of acres of land are affected," he was not conservative.

The question here immediately presented can arise only when an Osage Indian with a certificate of competency, who owns inherited land, has his certificate of competency revoked, and then only when he still owned but had mortgaged that inherited land at the time of revocation of his certificate of competency.

A local abstractor's records show that of the hundreds of Osage Indians who have been granted certificates of competency only 37 have been revoked. The Act authorizing the revocation was approved February 27, 1925; so that in seventeen years there have been only 37 revocations. It is very probable that of that 37 no more than a half a dozen owned inherited land at the time of revocation; and it is probable that of that half dozen no more than two or three had mortgaged such inherited land during the time the certificate of competency was in force. In fact we would not be surprised if it should be found that George Pitts was the only Indian in this exact situation.

IX.

The Decision of the State Supreme Court is not contrary to or in conflict with any federal statute or any holding of any court.

(1). The policy of Congress is to emancipate the Indians.

In furtherance of that policy Congress provided for the granting to the Indian of a certificate of competency to enable him to manage, control, and dispose of his lands the same as any citizen of the United States.

The original Osage Act which authorizes the issuance of certificates of competency to the Osages provided as follows, (Sec. 7, Act June 28, 1906 34 Stat. L. 539):

> "Seventh. That the Secretary of the Interior, in his discretion, at the request and upon the petition of any adult member of the tribe, may issue to such member a certificate of competency, authorizing him to sell and convey any of the lands deeded him by reason of this Act, except his homestead, which shall remain inalienable and non-taxable for a period of twenty-five years or during the life of the homestead allottee, if upon investigation, consideration and examination of the request he shall find any such member *fully competent and capable of transacting his or her own business and caring for his or her own individual affairs;* Provided, That upon the issuance of such certificate of competency the lands of such member (except his or her homestead) shall become subject to taxation, and such member, except as herein provided, *shall have the right to manage, control, and dispose of his or her lands the same as any citizen of the United States****"

Mr. Justice Hughes says in Levindale Lead & Zinc Mining Company v. Coleman, 241 U. S. 432, 36 S. Ct. 644, 60 L. Ed. 1080:

> "It was provided that upon the issuance of such a certificate of competency the lands of such 'member' except homestead lands, should 'become subject to taxation,' and that 'such member,' except as provided, should have the right to 'manage, control and dispose of his or

her lands the same as any citizen of the United States.' "

In Neilson v. Alburty, 26 Okl. 490, 129 P. 847, the Oklahoma Supreme Court, in speaking of the authority of an Osage Indian, with a certificate of competency, said:

(from the opinion p. 849 of 129 Pac.)

" 'And such member *** shall have the right to dispose of,' sufficiently comprehensive to warrant the construction contended for? 'To dispose of' means to exercise finally one's power of control over; to pass over into the control of some one else, as by selling; to alienate, to part with, to relinquish, to get rid of."

In Lynn v. Brown, 38 Okl. 209, 132 P. 810, it is said:

"(from opinion p. 812). The certificate of competency provided for by the special act relating to this tribe of Indians and their lands authorized the member to whom it was issued to sell and convey any lands deeded him by reason of that act, except his homestead, which authority was granted only after a finding that the member was fully competent and capable of transacting his or her own business, and caring for his or her own individual affairs. The land was thereafter made subject to taxation, and the member was vested with the full right to manage, control, and dispose of it the same as any citizen of the United States."

There are many similar expressions in the cases.

(2) Section 6 of the Act of April 18, 1912.

Section 6 of the Osage Act of April 18, 1912 (37 Stat. L. 86) provides for the partition of the inherited lands of the Osages and says:

"When the heirs of such deceased allottees *have cer-*

tificates of competency or are not members of the tribe, *the restrictions on alienation are hereby removed."*

The Supreme Court of the United States has interpreted this provision in exact accordance with the plain purport of the language used in the case of Kenny v. Miles, 250 U. S. 58, 63 L. ed. 841, 39 S. Ct. Rep. 417. We quote from the case:

"2. syl. Lands allotted in the name of an Osage Indian under Act June 28, 1906, whether allotted before or after her death, held, in view of sections 1, 2, 6, 7 and 8 thereof, restricted lands, so that, under Act April 18, 1912, sec. 6, they cannot be sold or partitioned after her death without approval of the Secretary of the Interior, neither she *nor her heirs,* who are of Osage blood and members of the tribe, *having received a certificate of competency.*

(from opinion p. 418)

"The Act of 1912, in its sixth section, treats the restraints applicable to living allottees as also applicable to such of the heirs of deceased allottees as are members of the tribe, and expressly provides that—

'When the heirs of such deceased allottees have certificates of competency . . . the restrictions on alienation are hereby removed.'

"Lah tah sah died without receiving a certificate of competency. Kenny and Miles, who claim to be her heirs, are of Osage blood and members of the tribe, *and neither has received such a certificate."*

And from the case of United States v. LaMotte, 67 Fed (2d) 788: (from opinion p. 789).

"The pertinent part of section 6 of the act approved

April 18, 1912 (37 Stat. 86), provides:

'When the heirs of such deceased allottees have certificates of competency or are not members of the tribe, the restrictions on alienation are hereby removed'

"(3) The statute is clear and unambiguous, and it was in force at all times material hereto. It removed the restrictions on alienation upon heirs of a deceased allottee having certificates of competency and upon those not members of the tribe".

For the complete information of the court we copy here the entire section 6 of the Act of April 18, 1912:

"Sec. 6. That from and after the approval of this act the lands of deceased Osage allottees, unless the heirs agree to partition the same, may be partitioned or sold upon proper order of any court of competent jurisdiction in accordance with the laws of the state of Oklahoma; Provided, That no partition or sale of the restricted lands of a deceased Osage allottee shall be valid until approved by the Secretary of the Interior. Where some heirs are minors, the said court shall appoint a guardian ad litem for said minors in the matter of said partition, and partition of said lands shall be valid when approved by the court and the Secretary of the Interior. *When the heirs of such deceased allottees have certificates of competency or are not members of the tribe, the restrictions on alienation are hereby removed.* If some of the heirs are competent and others have not certificates of competency, the proceeds of such part of the sale as the competent heirs shall be entitled to shall be paid to them without the intervention of an administrator. The shares due minor heirs, including such minor Indian heirs as may not be tribal members and those Indian heirs not having certificates of competency shall be paid into the Treasury of the United States and placed to the credit of the Indians upon the same conditions as attach

to segregated shares of the Osage national fund, or with the approval of the Secretary of the Interior paid to the duly appointed gguardian. The same disposition as herein provided for with reference to the proceeds of inherited lands sold shall be made of the money in the Treasury of the United States to the credit of deceased Osage allottees."

We think it must be conceded that in view of the admitted facts there was no restriction against alienation of the land here involved in the hands of the petitioner George Pitts.

This has been settled law for nearly thirty years.

(3). Section 7 of the Act of April 18. 1912.

Section 7 of the Act has no application in this situation, for section 6 of the same act controls.

(a) Precedent

Please note that section 6 says that when the heirs "have certificates of competency or are non-members of the tribe, the restrictions on alienation are hereby removed."

Section six covers two classes of heirs:

1. Those "who have certificates of competency."

2. Those who "are not members of the tribe."

As to each class of heirs "the restrictions on alienation are hereby removed.

The case of United States v. Mullendore, 30 Fed. Sup. 13, involved one Frank Deroin, a non member of the Osage Tribe.

We quote from the opinion:

"Two questions are presented: First, is section 7 controlling; second, if controlling, is it to be construed to prohibit alienation of inherited land until both lands and moneys are turned over to the heir.

"As to the first question:

"(1). Section 6 of the Act of April 18, 1912, 37 Stat. L. 86, 87, provides, in part: 'When the heirs of such deceased allottees . . are not members of the tribe, the restrictions on alienation are hereby removed.' Frank DeRoin was not a member of the tribe. Under the provisions of section 6, 'restrictions on alienation' by him are removed. 'Restriction' as used in such acts is synonymous with 'prohibition.' Barnett v. Kunkel, 8 Circ. 259 F. 394, 398. Obviously, the quoted portion of section 7 contains a prohibition against alienation and so imposes a restriction, and if section 7 controls it conflicts with section 6 in so far as non-members of the tribe are concerned.

"(2). It is the duty of the court to construe a statute so as to give effect to each and every part thereof and so as to avoid conflict between various provisions of the statute, 59 C. J. 948.

"*If the language of section 6 is taken to mean what it says, restrictions on alienation of Frank DeRoin's interest in this land are removed by it. This language is clear and definite.* The language of section 7 is not clear, because of the word 'such' preceding 'heir', but by holding that section 7 applies to heirs not included in the classification set forth in section 6, all conflict is avoided and each section of the statute has a field for operation without encroaching upon the field in which the other section operates.

"(3). Reading the Act of April 18, 1912, as a whole, there is apparent in it a purpose to protect Osage allot-

tees and their Osage Indian heirs through the imposition of restrictions upon the alienation of their allotted lands and trust moneys, but there seems to be no policy for the protection of non-members of the tribe, the implication being to the contrary. Compare Levindale, Lead and Zinc Co. v. Coleman, 241 U. S. 432, 36 S. Ct. 644, 60 L. Ed. 1080; Sec. 5, Act of March 2, 1929, 45 Stat. L. 1478, 1481, 25 U. S. C. A. sec. 331, note.

"(4). *I therefore conclude that the question of the alienation of Frank DeRoin's interest in the lands of Mary Black DeRoin is controlled by the provisions of section 6 rather than by the provisions of section 7 and that the lease and mortgage were and are valid.*"

Still quoting from the same opinion:

"As to the second question:

"(5, 6). Even were Section 7 applicable here, it is still my opinion that section does not invalidate the lease and mortgage. The language of the statute is 'that no lands or moneys inherited . . . shall be subject to or be taken or sold to secure the payment of any indebtedness incurred by such heir prior to the time such lands and moneys are turned over to such heir', but the Courts have many times held that 'and' in a statute may be read to mean 'or'. Exparte Clark 4, 30 Okl. Cr. 259, 236 P. 66 State v. Hooker, 22 Okl. 712, 98 P. 964; State v. Cooney, 70 Mont. 355, 225 P. 1007; Alexander v. State, 84 Tex. Cr. 75, 204 S. W. 644. There seems to be no logical reason for maintaining restrictions on the land until such time as the money may be turned over to the heir. A contrary holding would make the title to lands dependent upon matters which could not be ascertained from land records and would tend to make such lands unmarketable.

"(7). There is some contention that the land had not been 'turned over' to DeRoin at the time he executed the instruments in question but I cannot subscribe to that construction of the language quoted. The phrase is not

a technical one and it is my view that the requirement of the statute is satisfied when the heir is placed in possession of the property Technical consideration of whether or not DeRoin acquired his title upon the death of the ancestor or upon the date of the decree of distribution or at some intermediate time seems to be beside the point here, although it may be noted that the statutes of Oklahoma provide the administrator of the estate takes possession only for the purpose of administration and as soon as it appears that the lands are not necessary for the payment of debts, the lands shall be delivered to the heirs. Sec. 1193, 1218, Okl. Stat. 1931, 58 Okl. St. Ann. sec. 251, 291".

Please note that the opinion first holds that the situation is controlled by section 6, and then holds that section 7 cannot apply.

(b) Reasoning.

(x) Had it not been the intention of Congress to remove restrictions from the heir with a certificate of competency this provision of section six would have had no purpose at all, for the non-members of the tribe (usually white persons) were never restricted at all, and it took no act of Congress to relieve them of restrictions.

(y) From the language of section 7 itself it is clear that it has no application in this situation.

We quote Section 7:

"Sec. 7. That the lands allotted to members of the Osage Tribe shall not in any manner whatsoever be encumbered, taken, or sold to secure or satisfy any debt or obligation contracted or incurred prior to the issuance of a certificate of competency, or removal of restrictions

on alienation; nor shall the lands or funds of Osage Tribal members be subject to any claim against the same arising prior to grant of a certificate of competency. That no lands or moneys inherited from Osage allottees shall be subject to or be taken or sold to secure the payment of any indebtedness incurred by such heir prior to the time such lands and moneys are turned over to such heirs; Provided, however, That inherited moneys shall be liable for funeral expenses and expenses of last illness of deceased Osage allottees, to be paid under order of the county court of Osage county, state of Oklahoma; Provided further, That nothing herein shall be construed so as to exempt any such property from liability for taxes."

Note that the debt may be created and the lands may be mortgaged or encumbered or alienated at any time after the issuance of a certificate of competency, which in the George Pitts case was in 1910, and inherited lands and moneys made subject to be taken and sold to pay any indebtedness of such heir when turned over to him.

In this case it is admitted that the administration proceeding had been long since closed prior to the time of the commencement of this action. There was no attempt to subject the land to the payment of a debt until after the administration proceeding had terminated. In other words, no part of section 7 prohibits the mortgaging of land or alienating it at any time after the issuance of a certificate of competency. If anything is prohibited, it is the actual forcible taking, and subjecting the land to the payment of a debt prior to the time it is turned over.

Still in other words it is not the voluntary encumbering

that is prohibited, but the forcible taking by a creditor prior to the time of turning over.

Hence the section could have no application at all to the facts which exist here.

(c) George Pitts had possession of the land from the time of the death of his wife, Mamie. No "turning over" was ever required or done.

She was a full-blood restricted Osage Indian. The County Court had jurisdiction to determine her heirs, but her administrator had no right to, and did not have, custody, control, or possession of her lands.

This language is from Swain v. Hildebrand, 169 Okl. 327, 36 P(2d) 942, an Osage case:

"Thus it has been held that the restricted lands of an Indian are not subject to administration. Cowokochee v. Chapman, 90 Okla. 121, 215 P. 759; Barnard v. Bilby, 68 Okl. 63, 171 P. 444. And that prior to specific enactment of Congress, the state courts had no authority to determine heirs, in so far as it would affect restricted property during the trust period. Gray v. McKnight, 75 Okl. 268, 183 P. 489; Caesar v. Krow, 71 Okl. 233, 176 P. 927. And the income accruing to an Osage headright cannot be sold and transferred by an Osage Indian by blood, because there is no specific congressional authority therefor. DeNoya v. Arrington, 163 Okl. 44, 20 P(2d) 563; Taylor v. Tayrien, 51 F(2d) 884 C. C. A.); In re Dennison (D. C.) 38 F(2d) 662. And that such headright does not pass to the trustee in bankruptcy. Taylor v. Tayrien, supra; In re Denison, supra; Taylor v. Irwin (C. C. A.) 60 F(2d) 495.

"In Williams v. Hewitt, 74 Okl. 283, 181 P. 286, this court held that there was nothing in the Osage allotment

act of 1906 conferring probate jurisdiction on the county courts of this state, and that the subsequent act of 1912 (37 Stat. 86) only operated to confer authority and jurisdiction on such courts to the extent therein expressly provided, thus recognizing the exclusive control of these Indian matters to be in the federal government."

The cases cited by the petitioner hold that the county court has jurisdiction of the property of a deceased restricted Osage Indian to the extent of determining who are heirs to that property, but they do not hold that the administrator can take possession of and administer upon the restricted lands. The county court is made an agent of the federal government for the purpose of determining the heirs to the restricted property, paying the last illness claims and expenses of administration, but it has never been given the right to take possession of or sell the restricted lands for payment of the debts or expenses of administration. Those two are the only purposes for which the administrator is ever entitled to possession of the decedent's real estate, and as the restricted lands of an Osage Indian cannot be sold the courts have consistenetly held that the administrator was not entitled to possession of them.

In the case of In re Thompson's Estate, 179 Okl. 240, 65 P(2) 442, it was held that the county court had jurisdiction to determine the heirs to restricted property notwithstanding the fact that it was not an asset of the estate for the payment of debts.

In the case of Globe Indemnity Co., v. Bruce, 81 F(2d) 143 the court approved the holding in the case of Denoya v.

Arrington, 163 Okl. 44, 20 P(2) 924, to the effect that the Osage headright (the community interest in the oil and gas) was not an asset of the estate, except as to the accruing payments which were turned over by the Osage Agency to the Administrator.

There could be even less question about restricted real estate of a restricted Osage Indian for there is no provision of any act of Congress which would under any circumstances permit its use for the payment of debts or expenses of administration. The Osage acts do provide for the payment of certain debts from the income from the headright, but the Acts of Congress prohibit the encumbrance or sale by any one or for any purpose of the restricted lands of a restricted Osage Indian.

Section 7 is undoubtedly merely the statutory expression of the general law to the effect that an heir, or creditor of an heir, cannot interfere with the possession of the administrator until the administrator has used the property belonging to the estate for the purpose of paying the debts and expenses of administration, but here the administrator was never entitled to possession of the restricted land of Mamie Pitts to pay debts or to pay expenses of administration. He was never entitled to possession of it and the only jurisdiction the county court ever had of it was to determine the heirs.

Just for the purpose of argument let us suppose that the administrator was entitled to possession of this restricted land, still the mortgage is valid. Any heir may sell, mortgage and convey his interest in inherited real estate at any time after the death of the decedent, and the title so con-

veyed is good. It is subject only to the right of the administrator to dispose of that real estate for the purpose of paying debts against the estate of the decedent. If it is not used by the administrator for that purpose, then the grantee of the heirs gets full and complete title. So in this instance George Pitts could convey, alienate, mortgage. Then, if it be assumed that the administrator ever had anything to do with the real estate, he was through with it long before this foreclosure proceeding was begun. George Pitts was determined to be the sole heir and the land had not been sold by the administrator. Therefore, the mortgage is absolutely good and the holder may foreclose. We say these things would be true even had the administrator had the right to possession.

Nothing more than that could have been intended by section 7. It says nothing more than that.

(d) Conclusion concerning the Act of April 18, 1912.

In conclusion may we say concerning the act of April 18, 1912:

1. Section 6 controls the situation by its own clear language.

2. Section 6 was held to control in the case of United States v. Mullendore, 30 Fed. Supp. 13.

3. Section 7 is not applicable.

4. It was held in the United States v. Mullendore that section 7 had no application.

5. The land and the right to possession passed to George Pitts on the death of his intestate, and the ad-

ministrator never had possession or the right to possession and hence never "turned it over" to him.

6. Section 7 cannot apply in any event for under no circumstances does it purport to delay or hinder voluntary alienations.

7. Section 7 in no way undertakes to prohibit a contract concerning inherited land at any time after a certificate of competency has been granted.

4. Section 3 of the Act of February 27, 1925.

(a). The meaning of certificate of competency.

In considering section 3 of the Act of February 27, 1925, it should be borne in mind that Congress has in all legislation recognized the distinction between those Osage Indians with certificates of competency and those without.

The statutes already referred to herein show that distinction. Here are some of the others:

Section 1 of the Act of February 27, 1925, provides that each quarter there shall be paid to each adult Osage Indian of one-half or more Indian blood "having certificate of competency" his entire share of the accumulated income of the tribe, and to each adult member of the Tribe, "not having a certificate of competency" certain limited amounts.

We direct attention to the language of another section of the same Act.

"Sec. 6. No contract for debt hereafter made with a member of the Osage Tribe of Indians not having a certificate of competency, shall have any validity, unless approved by the Secretary of the Interior. In addi-

tion to the payment of funds heretofore authorized, the Secretary of the Interior is hereby authorized in his discretion to pay, out of the funds of a member of the Osage Tribe not having a certificate of competency, any indebtedness heretofore or hereafter incurred by such member by reason of his unlawful acts of carelessness or negligence"

Note that Indians who have certificates of competency may contract. (This section was construed as applicable to Osages of less than one-half Indian blood and was later amended so as to make it inapplicable to Osages of less than one-half Indian blood).

In other Acts the intention is shown by Congress to free the certificate of competency Indians from supervision.

(b.) The meaning of Section 3, and the mischief to be remedied.

The language of section 3 definitely discloses no intention to reimpose restrictions on inherited land of an Osage Indian with a certificate of competency.

We quote the entire section and direct attention to the fact that the second sentence was excluded from the quotation of the section in the petitioner's brief, and neither was it quoted or referred to in the opinion in the case of United States v. Johnson, 29 Fed. Supp. 300, relied on by the petitioner:

"Sec. 3. Lands devised to members of the Osage Tribe of one-half or more Indian blood or who do not have certificates of competency, under wills approved by the Secretary of the Interior, and lands inherited by such

> Indians, shall be inalienable unless such lands be conveyed with the approval of the Secretary of the Interior. Property of Osage Indians *not having certificates of competency* purchased as hereinbefore set forth shall not be subject to the lien of any debt, claim or judgment except taxes, *or be subject to alienation*, without the approval of the Secretary of the Interior."

If there is any ambiguity or confusion in the first sentence of that section, it is certainly made clear and definite by the second that there was no intention by Congress to reimpose restrictions against alienation on lands inherited by an Indian who had a certificate of competency.

It will be remembered that by section 6 of the 1912 Act those restrictions had been removed.

It was the decision of the Supreme Court of the United States in the case of LaMotte v. United States, 254 U. S. 570, 65 L. ed. 410, 41 S. Ct. 204, which caused the enactment by Congress of this section 3 of the Act of Feb. 27, 1925. In that case it was held that the restrictions against alienation on the lands of a full blood restricted Osage Indian were removed by the execution by such Indian of a will approved by the Secretary of the Interior; that the devisees under such will took the land free of restrictons even if the devisees were restricted full-blood Indians without certificates of competency.

The United States Supreme Court reasoned that the taking under such a will was taking by purchase; that the will was an alienation, and having been approved by the Secretary of the Interior, was an alienation with the approv-

al of the Secretary of the Interior, and consequently that the restrictions were removed from the lands in the hands of the beneficiary under the will no matter what his status.

The Interior Department sought to change that situation as to the restricted Indians and secured the enactment of section 3 of the 1925 Act.

Congress uses the word "purchased" because the United States Supreme Court held that the taking under a will was taking by purchase.

That Congress did not intend to deny the right to alienate to any Indian who had a certificate of competency, no matter what his quantum of Indian blood, is made very clear and definite by the second sentence, which says the property of Osage Indians (any Osage Indians) not having certificates of competency purchased as hereinbefore set forth (that is, taken under will or by inheritance) shall not be subject to a lien, etc., or be subject to alienation without the approval of the Secretary of the Interior.

It is by this sentence recognized by Congress that such lands in the hands of an heir or devisee, who has a certificate of competency, are subject to alienation, and the intention to leave the certificate of competency Indian free to alienate is clearly expressed.

We must look to the mischief which Congress was seeking to remedy. It was that brought about by the LaMotte decision which freed the willed land so that it could be alienated in the hands of a non certificate of competency full blood Indian.

There had been no new mischief as to certificate of competency Indians. His inherited land had been freed from restrictions by the Act of Congress itself since the passage of section 6 of the Act of April 18, 1912. The purpose not to change the law as to such Indian is clearly expressed.

It is also clear from the first sentence alone that it was not intended to further restrict certificate of competency Indians.

The language of the first sentence of section 3 which gives rise to the discussion is:—"Lands devised to members of one-half or more Indian blood or who do not have certificates of competency . . ."

Now what Indians are being talked about; what Indians are to be affected? There is only one sentence. The clause beginning with the word "who" is a relative clause, beginning with a relative pronoun. By the rules of grammatical construction it is a qualifying clause, qualifying the persons or class already mentioned in the sentence.

The subject of the sentence is land and we are trying to find out what lands are meant; the lands of whom. They are lands devised. Devised to whom? Members of the Osage Tribe of one-half or more Indian blood. Now any other qualifying description of those to whom the lands are devised cannot act otherwise than upon the class already described or named, namely, "members of the Osage Tribe of one-half or more Indian blood." Necessarily the "who" clause has to refer to the Indians already mentioned and no other Indians have been mentioned, except those of one-half or more Indi-

an blood. So the language can mean nothing else except those Indians of one-half or more Indian blood, who do not have certificates of competency, and that must be true notwithstanding the fact that the confusing word "or" appears before the word "who". It has to be true because there are no other Indians described to whom the "who" clause could refer.

The words "of one-half or more Indian blood" cannot be eliminated as descriptive of the Indians meant any more than the word "Osage" could be eliminated as descriptive of the Indians meant.

Then the inevitable conclusion is that the Osage Indians of one-half or more Indian blood, who do not have certificates of competency, cannot alienate.

It then follows that the converse is equally true that those Osage Indians of one-half or more Indian blood, who do have certificates of competency, may alienate.

We also call attention of the court to the fact that there is no attempt by the language used in this section 3 or of the entire act of February 27, 1925, to repeal or amend section 6 of the act of April 18, 1912, which so specifically and definitely removed the restrictions against alienation of the heir who had received a certificate of competency.

(c). The holding of Judge Kennamer in United States v. Johnson, 29 Fed. Supp. 300 does not support the petitioner's contention.

The only question which Judge Kennamer had for de-

cision, which is of interest here, is whether or not section 3 of the Act of 1925 applies to John Holloway, a less than one-half blood Indian without a certificate of competency. The contention being made in behalf of Johnson was that as John Holloway was less than one-half blood Indian the section did not apply.

Judge Kennamer decided that it did apply to all Osages whether one-half blood or more or less than one-half blood. Then by inference he decided that the only thing which would have prevented the application of the section would have been the granting to the heir of a certificate of competency.

In the case at bar George Pitts was granted a certificate of competency which placed him in a status not covered by the opinion in the Johnson case.

Counsel will say that the reasoning in the Johnson opinion is such that it leads to the conclusion that Judge Kennamer meant to say that, "if the heirs were full-bloods, they could not alienate, even if they had been granted a certificate of competency." Counsel's reasoning is that Judge Kennamer meant to imply, by saying that the section covered two classes:

First, members of the Tribe of one-half or more Indian blood.

Second, members of the Tribe who do not have certificates of competency,

that Indians of one-half or more Indian blood cannot convey, even if they had certificates of competency.

We are sure that Judge Kennamer intended to make no such holding, for several times in his opinion he, at least by inference, says the granting of a certificate of competency gives the right to alienate.

Note his general statement early in the opinion:

> "None of the Indians involved in this cause were or have ever been issued a certificate of competency."

Appearing, as this statement does, at the outset of the opinion, it shows that he was eliminating the certificate of competency question from his consideration.

If he had in mind that the full-bloods could not alienate, even if they had certificates of competency, he need not have mentioned the certificate of competency in connection with any Indian except John Holloway, for all the other Indians involved were full-bloods.

It is quite notable too that Judge Kennamer calls attention to section 6 of the Act of April 18, 1912, and states that when the heirs of deceased allottees have certificates of competency "the restrictions on alienation were removed."

This is the language used:

> "The Act of April 18, 1912, 37 Stat. 86, authorized the partition of restricted lands of deceased allottees, subject to the approval of the Secretary of the Interior, and declared that when the heirs of deceased allottees have certificates of competency, or are not members of the Tribe, the restrictions on alienation were removed."

Therefore the opinion holds clearly and definitely that when the heir has a certificate of competency the restrictions are removed, which we are certain establishes that

there was no intention on the part of Judge Kennamer to hold or to state that the land was restricted in the hands of an heir who had a certificate of competency.

Also please observe that in paragraph numbered 3 of the opinion, attention is called to the fact that the heirs of Sin tsa wah kon tah, to whom the land first descended, "did not have certificates of competency", clearly implying that, if they had had, the restrictions against alienation would have been removed.

Then again in the same paragraph is this sentence:— "The last two are unallotted Indians, born since July 1st, 1907, and neither has a certificate of competency."

Here again is a clear indication that the writer of the opinion has kept definitely in mind the distinction between heirs with certificates of competency and heirs without certificates of competency.

It is again made very evident that Judge Kennamer was not attempting to decide that the certificate of competency did not give the right to alienate by the fact that the second sentence in section 3 of the Act of 1925 was not quoted or ever mentioned in his opinion. As the second sentence so clearly states the intention to impose no restrictions upon any Indian with a certificate of competency, it is very evident that Judge Kennamer would not have overlooked this sentence had there been any intention in his mind of holding that the certificate of competency did not give the right to convey. Judge Kennamer not only throughout his opinion assumes that the Indian with the certificate of competency

may alienate, but he states it and calls attention to section 6 of the 1912 Act and says that restrictions are removed by it when a certificate of competency has been granted.

If there could be any doubt from this Johnson opinion as to Judge Kennamer's holding concerning the certificate of competency Indian, that doubt is entirely removed by his holding in the case of United States v. Howard, 8 Fed. Supp. 617.

In that case the two full-blood restricted Osage Indians, each without a certificate of competency, had inherited lands from a full-blood restricted Osage Indian without a certificate of competency. The two heirs then partitioned the land and the Sheriff's deeds in the partition action were approved by the Secretary of the Interior. Judge Kennamer held that the approval of the Sheriff's partition deeds to these two heirs by the Secretary of the Interior had removed their restrictions against alienation but that by section 3 of the Act of February 27, 1925, here under consideration, the restrictions were reimposed upon these full-blood Indian heirs without certificates of competency, they having inherited the land.

In his opinion, however, he very clearly holds that section 3 does not reimpose restrictions upon Indians who have certificates of competency.

We quote the third syllabus of the opinion:

> "3. Restrictions against alienation upon land of members of the Osage Tribe of Indians, which was acquired by *incompetent heirs*, by inheritance, although restrictions were removed by manner of acquisition

through partition proceedings, held reimposed by later statute placing restrictions upon lands devised or inherited by members of tribe *without certificates of competency*, so that conveyances by such heirs, made after enactment of statute, were void. (St. Okl. 1931, sec. 1614, et seq.; Act April 18, 1912, 37 Stat. 87, sec. 6; Act Feb. 27, 1925, sec. 3, 25USCA, sec. 331 note)."

Note that in the opinion it is stated that Wah hrah lum pah, the original Osage Allottee, was a full-blood restricted Indian who died "without having received a certificate of competency" and that the land descended to her two daughters, Patricia Butler and Grace Entokah Abbott, both full-blood Osage Allottees "who have not been granted certificates of competency."

Then the holding is that the partition action between these two heirs approved by the Secretary of the Interior removed the restrictions against alienation, but that section 3 of the Act of Congress of February 27, 1925, reimposed the restrictions against alienation and in discussing Section 3 this language is used:

"A reading of the Act discloses that its purpose is to protect the *incompetent* Osage Allottees . . . "

Quoting further from the opinion:

"It clearly appears that the lands devised to members of the Tribe *without certificates of competency* and the lands inherited by such Indins were inalienable."

Still quoting from the opinion, on page 619:

"The purpose of the Act plainly appears from the language employed in it; it undertook to reimpose restric-

tions upon all property whether inherited by or purchased for *incompetent* members of the tribe. In the instant case, the property involved came first by inheritance and then, by reason of the partition proceedings, the estate was changed to that of purchase; in my opinion the purpose and language of the act is sufficiently broad to include the lands in question.

"I am of the opinion that the 1925 Act of Congress reimposed restrictions upon all lands of *incompetent Osage allottees*, and that while the lands were freed in the partition proceeding, such restrictions were reimposed by section 3 of the Act of Congress of February 27, 1925. All such lands were restricted at the date of the conveyances, restrictions having been reimposed such conveyances are void."

(d). The Congressional Committee Report.

The Committee on Indian Affairs of the House of Representatives of the United States on March 5, 1924, made a report to the House concerning the bill which was enacted into law, being the Osage Act of February 27, 1925, under discussion here. In that report this is said:

"Section 3. This Section provides that lands devised by will, approved by the Secretary of the Interior, and lands belonging to *incompetent* allottees shall not be alienated without the consent of the Secretary of the Interior, thus preventing the incompetent Indian from disposing of the land so received without adequate consideration."

This Committee of Congress unquestionably thought that Section 3 means exactly what we contend it means, that it did not prevent a *"competent" Indian*, that is, an Indian

with a certificate of competency, from alienating his inherited land.

(e). Conclusion as to Section 3 of the 1925 Act.

The Supreme Court of Oklahoma was eminently right when it said that "in any event, it is clear that all Indians holding certificates of competency were excluded from the restrictions of Section 3".

In conclusion may we state:

1. As that court said, it is clear. It is made clear by the first sentence in section 3.

2. It is made more clear and definite by the second sentence of section 3.

3. It is made clear by the expressions and holdings in the Johnson case and in the Howard case.

4. It is made clear by section 6 of the 1912 Act.

5. It is made clear by section 7 of the 1906 Act.

6. It is made clear by section 4 of the same 1925 Act, which authorizes the revocation of such certificates of competency and provides that no former contract shall be impaired by such revocation.

7. It is made clear by section 6 of the 1925 Act, which excludes the certificate of competency Indians from those who may not contract a valid debt.

8. It is made clear by all of the several acts of Congress concerning certificate of competency Indians.

9. It is made clear by the general policy of Congress with reference to such Indians.

10. It is made clear by the many expressions of both the State and Federal courts as to the effect of certificates of competency.

11. It is made clear by the act of the Department itself in revoking George Pitts' certificate of competency thirteen years after the passage of the 1925 act and on year after the contract in question was made.

The Congress and the Courts and the Department have at all times been in accord to the effect that the certificate of competency Indian may alienate his inherited land.

There is no solid foundation for a contrary argument, and no precedent or logic which supports it.

CONCLUSION.

There is no special or important reason for a review of the Oklahoma Supreme Court opinion by this court.

That decision is in accord with the Acts and policy of Congress, and decisions of this court, and of all other courts touching the question as to the rights, privileges, obligations of an Osage Indian who has been granted a certificate of competency.

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